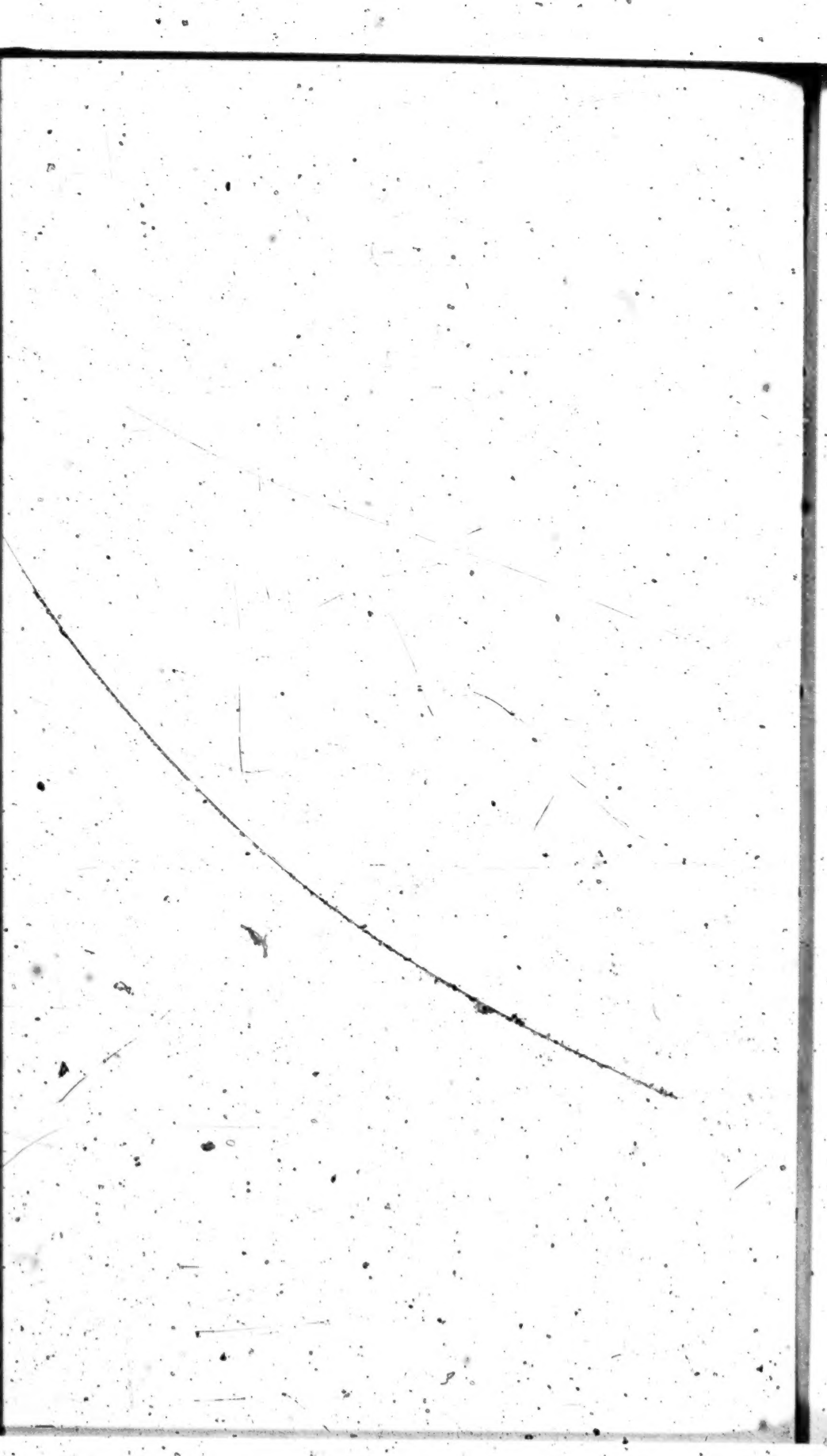

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-188

PECOLA ANNETTE WRIGHT, *et al.*,

Petitioners,

—v.—

COUNCIL OF THE CITY OF EMPORIA, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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Opinions Below

The opinions of the courts below are as follows:

1. District Court's Findings of Fact and Conclusions of Law of August 8, 1969 and Order of August 8, 1969 granting preliminary injunction, unreported (190a-195a).[1]

2. District Court's Opinion of March 2, 1970, reported at 309 F. Supp. 671 (293-309a).

3. Court of Appeals' Opinions of March 23, 1971, reported at 442 F.2d 570, 588 (311a-347a).

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[1] Citations are to the Single Appendix filed herein.

Earlier proceedings in the same case are reported as *Wright* v. *County School Bd. of Greensville County*, 252 F. Supp. 378 (E.D. Va. 1966) (15a-28a).

Jurisdiction

The judgment of the Court of Appeals was entered on March 23, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The petition for a writ of certiorari was filed in this Court on May 20, 1971, and was granted on October 12, 1971.

Question Presented

Whether the Court of Appeals erred by holding that new school districts may be operated which divide a unit that is faced with the duty to desegregate a dual system, where the changed boundaries result in less desegregation, and where formerly the absence of such boundaries was instrumental in promoting segregation.

Constitutional and Statutory Provisions Involved

This matter involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following sections of the Virginia Code (statutes related to the operation of school districts and divisions within the Commonwealth of Virginia) are set out in an appendix to this Brief, *infra*: Va. Code Ann. §§22-7, -30, -34, -42, -43, -89, -99, -100.1, -100.2 (Repl. 1969).

Statement

Background of the Litigation

This lawsuit began with the filing of a Complaint on March 15, 1965 seeking the desegregation of the public schools of Greensville County, Virginia (2a-11a), a rural county near the center of which was located the town of Emporia (15a).[2] As the district court found, "[p]rior to 1965, the county operated segregated schools based on a system of dual attendance areas. *The white schools in Emporia served all white pupils in the county.* The four Negro elementary schools were geographically zoned, and the Negro high school served all Negro pupils in the county" (emphasis supplied) (15a). On January 27, 1966 the court approved, subject to satisfactory amendment so as to provide for faculty desegregation, a freedom-of-choice plan

[2] Under Virginia law applicable at the time of the events relevant hereto, the county was the basic operational school unit, Va. Code Ann. §22-42 (Repl. 1969). In 1965, when Emporia had the status, under Virginia law, of a "Town," the County School Board of Greensville County operated public schools for children residing therein as well as in the rest of Greensville County. Although the Town might have sought designation by the State Board of Education as a separate school district, either to obtain representation on the county school board, see Va. Code Ann. §22-42 (Repl. 1969) or to operate its own school system, Va. Code Ann. §22-43 (Repl. 1969), there is no indication in this record of any attempt to do so while Emporia was a Town.

which the county had adopted in April, 1965 in order to retain its eligibility for federal funds under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d-1 *et seq.* (16a). *Wright* v. *County School Bd. of Greensville County*, 252 F. Supp. 378 (E.D. Va. 1966).

On July 31, 1967, the Town of Emporia became a city of the second class[3] and a school board for the new city was appointed.[4] On December 7, 1967, the State Board of Education designated Emporia and Greensville County a single school division (245a).[5] The schools continued to be operated under the freedom-of-choice plan by the county school board for both city and county children while discussions between officials about ultimate school organization pro-

[3] See Va. Code Ann. §§15.1-978 *et seq.* (Repl. 1964). Unlike towns, cities in Virginia are entities politically independent of the counties which surround them, see *City of Richmond* v. *County Board*, 199 Va. 679, 684, 101 S.E.2d 641, 644 (1958); *Colonial Heights* v. *Chesterfield County*, 196 Va. 155, 82 S.E.2d 566 (1954), and they may maintain duplicate institutions for the provision of governmental services except for specified shared services, Va. Code Ann. §15.1-1005 (Repl. 1964). Cooperative agreements between political subdivisions are authorized, Va. Code Ann. §15.1-21 (Repl. 1964).

[4] Va. Code Ann. §22-89 (Repl. 1969).

[5] Virginia law provides that the State Board is ultimately responsible for the administration of public free education in the Commonwealth, Va. Code Ann. §22-2 (Repl. 1969); it was required (at times pertinent to this case) to divide the State "into appropriate school divisions" of at least one county or city, each school division to be administered by a superintendent of schools meeting qualifications established by the State Board and exercising such powers as were conferred by the State Board, Va. Code Ann. §§22-30, -31, -36 (Repl. 1969). In a school division composed of more than one political subdivision, the Division Superintendent serves the school boards of each and, if separate school systems are being maintained, administers each system (144a, 245a, 267a-269a). The school boards of the independent political subdivisions constituting a single school division must meet jointly to select a division superintendent from the eligible candidates' list approved by the State Board of Education, Va. Code Ann. §§22-32, -34 (Repl. 1969); see also, 98a.

ceeded.[6] Subsequently, on April 10, 1968, the school boards and governing bodies of the city and county entered into a four-year contract providing that the County would operate public schools for city children in return for payment by the City of a specified percentage of the capital and operating cost (32a-36a).[7]

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[6] Virginia law provided that the city and county school boards might: subject to the approval of the State Board and local governing bodies, establish joint schools, Va. Code Ann. §22-7 (Repl. 1969); operate separate school systems; establish a single school board for the school division and operate as a single system, again subject to the approval of the State Board and local governing bodies, Va. Code Ann. §§22-100.1, -100.2 (Repl. 1969); or by contractual agreement the county might provide educational services for city children, Va. Code Ann. §22-99 (Repl. 1969).

On November 27, 1967, the Greensville County Board of Supervisors had resolved that it would not approve joint operation (30a); so long as this position was maintained, the city school board's remaining options were either an independent school system or contractual agreement.

[7] Because no settlement had yet been reached, the County Board of Supervisors resolved on March 19, 1968 (31a) to terminate provision to city residents of all but statutorily required services unless a contractual agreement were accepted by the city by April 30. Thus, the Mayor of Emporia and the Chairman of its School Board testified in 1969, the contract was signed only under pressure (233a) and only because the failure of the boards to agree on a price for the schools located in the city prevented Emporia from operating its own school system (119a). However, the city could have filed suit in 1967, as it did in 1969 (237a, 242a) to establish its equity in the schools had it desired to operate an independent system, Va. Code Ann. §§15.1-1003, -1004 (Repl. 1964); *Colonial Heights* v. *Chesterfield County*, 196 Va. 155, 82 S.E.2d 566 (1954); *School Bd.* v. *School Bd.*, 200 Va. 587, 106 S.E.2d 655 (1959). Instead, it negotiated for preferred contractual terms (see 230a).

Both the Mayor and School Board chairman said they were satisfied with the education provided city children by the county prior to the June 25, 1969 district court order (163a, 235a), and, in fact, the July 7, 1969 letter from the City Council to the County Supervisors proposing an independent system recites that the city signed the contract because of its judgment about educational benefits of a combined school system:

> In 1967-68 when the then Town of Emporia, through its governing body, elected to become a city of the second class, it

June 21, 1968, plaintiffs filed a Motion for Further Relief consistent with this Court's ruling in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968) (37a). The district court directed the County School Board to demonstrate its compliance with *Green* or to present a plan to bring it into compliance (1a [Docket Entries, p. 2]). August 8, 1968, the board requested that freedom-of-choice be continued for another year while a zoning or pairing plan was developed (294a).[8] The district court acquiesced because of the short time remaining before the start of the school year and because a new division superintendent had just been hired (50a, 182a; see 98a) but required submission of a new plan by January 20, 1969 (1a, 294a). Again the County School Board responded (38a-45a) by asking that freedom of choice be continued.[9] In the alternative, the Board proposed: to establish different cur-

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was the considered opinion of the Council that the educational interest of Emporia citizens, their children and those of the citizens and children of Greensville County, could best be served by continuing a combined City-County school division, thus *giving students from both political subdivisions full benefits of a larger school system* (emphasis supplied) (56a).

[8] The district court's opinion sets forth enrollment statistics for the 1967-68 school year which show that under freedom of choice, no white students had elected to attend any of the five all-black schools, while 96 of 2568 black students had chosen to enroll in two predominantly white facilities (294a). Faculty desegregation was minimal (*ibid.*).

[9] The board asked to modify the outstanding decree (29a) as follows (42a): (1) Faculty and administrators would be permitted to encourage exercise of choices in favor of desegregation, see *United States* v. *Hinds County School Bd.*, 417 F.2d 852 (5th Cir. 1969); (2) If substantial desegregation did not occur in this manner, elementary children would be assigned to special classes across racial lines, see, *e.g.*, *United States* v. *Board of Educ. of Webster County*, 431 F.2d 59 (5th Cir. 1970); (3) Course duplication in the two high schools would be eliminated so as to bring about attendance at both facilities; (4) At least 25% of the faculty at each school would be of the minority race.

ricular programs—academic, vocational-technical, and terminal-degree—at each high school and to assign students according to their curricular choice (43a),[10] and to reassign black elementary students to white elementary schools on the basis of standardized achievement test scores.[11]

Following a hearing February 25, 1969, the district court disapproved the request to continue freedom of choice and took the board's alternative proposal under advisement (1a) pending submission of enrollment projections under the testing plan based on student scores (51a). On March 18, 1969, petitioners filed their own proposal to desegregate the Greensville County schools by pairing (46a-47a). At the conclusion of an evidentiary hearing on June 23, 1969, the district court announced orally (49a-53a) that it would disapprove the school board's alternative plan because it would "substitute a segregated—one segregated system for another segregated school system and that is all it is" (51a). The court directed implementation of the plan proposed by the plaintiffs:

> The Court directs therefore that the proposed plan of desegregation submitted by the plaintiffs is to be put in effect and a mandatory injunction directing the School Board to put that plan in effect commencing September would be entered.
>
> Now, the Court will consider any amendments to it so as not to preclude a better plan, but so there is no further delay and so we don't come up in August and

[10] See *Lemon* v. *Bossier Parish School Bd.*, 446 F.2d 911, 444 F.2d 1400 (5th Cir. 1971).

[11] See *Anthony* v. *Marshall County Bd. of Educ.*, 419 F.2d 1211 (5th Cir. 1969); *United States* v. *Sunflower County School Dist.*, 430 F.2d 839 (5th Cir. 1970); *United States* v. *Tunica County School Dist.*, 421 F.2d 1236 (5th Cir. 1970); *United States* v. *Board of Educ. of Lincoln County*, 301 F. Supp. 1024 (S.D. Ga. 1969); *Moses* v. *Washington Parish School Bd.*, Civ. No. 15973 (E.D. La., August 9, 1971).

> say, "Well, now, we have got a plan but can't do it for a year," the School Board is directed today, now, to commence their work to do whatever is necessary to put in effect the plan for desegregation submitted by the plaintiff. (53a)

June 25, 1969, a written order disapproving the board's plan and mandatorily enjoining implementation of the pairing plan proposed by plaintiffs was entered (54a-55a).[12]

Emporia Moves to Operate a Separate System

On July 7, 1969—twelve days after entry of the district court order requiring pairing of schools in Greensville County—the City Council of Emporia wrote to the Greensville County Board of Supervisors and School Board (56a-60a) formally announcing the City's intention to operate a school system separate from Greensville County effective August 1, 1969 (57a). The Council proposed that the April 10, 1968 contract be terminated by mutual agreement (58a), that a new contract be drafted to cover shared services other than public schools, including a procedure to determine the equity of the city and county in their school buildings (59a-60a), and that pending such determinations, the title to school buildings located within Emporia be transferred to the City immediately so that its school system could begin operation (60a). As part of its proposal, the Emporia Council offered to accept county students on a tuition basis in its separate school system (*ibid.*).

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[12] That order was subsequently modified in accordance with the comments of the district court quoted next above. On July 23, 1969, the County School Board filed a motion to amend the June 25 judgment by substituting a different plan (76a-79a). A hearing was held July 30, 1969 at which yet another version of a pairing plan was proposed by the County School Board and adopted by the district court (162a, 174a, 295a).

The Council's letter clearly indicated that the source of its concern was the desegregation decree, rather than any longstanding dissatisfaction with the county school system:

> In 1967-68 when the Town of Emporia, through its governing body, elected to become a city of the second class, *it was the considered opinion of the Council that the educational interest of Emporia Citizens, their children* and those of the citizens and children of Greensville County, *could best be served by continuing a combined City-County school division,* thus giving students from both political subdivisions full benefits of a larger school system.
>
> The Council was not totally unaware of a Federal Court suit against Greensville County existing at that time, regarding school pupil assignments, pupil attendance, and etc., but they did not fully anticipate *decision by the court which would seriously jeopardize the scholastic standing and general quality of education* affecting City students attending the combined school system.
>
> • • •
>
> The pending Federal Court action, at the time of Emporia's transition from a town to a city, was finally decided by the court on June 23, 1969. The resulting order REQUIRES massive relocation of school classes, excessive bussing of students and mixing of students within grade levels with complete disregard of individual scholastic accomplishment or ability.
>
> *An in-depth study and analysis of the directed school arrangement reflects a totally unacceptable situation to the Citizens and City Council of the City of Emporia.*
>
> • • •
>
> . . . In these preliminary meetings, the City expressed a sincere need for an increase in its geographical

> boundaries through *extensive annexation in order to provide an adequate tax basis to support an independent school system.* The Council is of the opinion annexation of portions of land beyond the City limits is most desirable in the interest of the people involved and the City. A careful preliminary study, including all facets of school operation and with particular attention to objections raised by County Officials, has been conducted and the facts indicate that it *may be feasible* to operate a City School System *without immediate annexation* (emphasis supplied) (56a-58a).

The letter did not request that the County Board propose any alternative desegregation plan to the district court.

July 9, 1969, a special City Council meeting was held, which the Mayor announced was for the purpose of " 'establishing a City School System' " (61a). The minutes reflect that most of the meeting was held in executive session. July 14, 1969, the City Council met again in special session; the minutes (62a-66a) reflect the purpose of the meeting was "to take action on the establishment of a City School System, to try and save *a school system for the City of Emporia and Greensville County*" (emphasis supplied) (62a). The Mayor is reported in the minutes to have said, " 'it's ridiculous to move children from one end of the County to the other end, and one school to another, to satisfy the whims of a chosen few.' He said, 'The City of Emporia and Greensville County are as one, *we could work together to save our school system*' " (emphasis supplied) (*ibid.*).

At the July 14 meeting, the City School Board chairman reported the racial composition of each school under the plan approved by the district court. After the Mayor advised the Council that the County Supervisors had de-

clined to transfer school buildings within Emporia to the city for fear of "placing themselves in contempt of the Federal Court order" (63a), the Council discussed possible termination of the contract by mutual agreement or annexation. The City School Board chairman told the Council that if the City had title to the three school facilities located in Emporia, 500 county students could be accommodated in addition to city residents (64a-65a);[13] and finally, the Council voted unanimously to direct the City Attorney to take the necessary steps to determine the city's equity in county holdings (including schools) (66a).

The County School Board met two days later and reiterated that while it would appeal the district court's order and also seek to change the terms of the order, it would not transfer facilities to Emporia or assist in the creation of a separate system because

> this Board believes that such action is not in the best interest of the children of Greensville County. . . . (67a-69a).

July 17, the Emporia City School Board met to adopt a resolution requesting designation of Emporia as a separate school division (70a-72a). Again, the resolution demonstrates that the source of concern was the desegregation decree.[14] A similar resolution was adopted by the City Council on July 23, 1969 (73a-75a).

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[13] There were 728 white students residing in the county area outside Emporia (304a).

[14] WHEREAS it is the considered opinion of the Board that the requirements under the decree of the Federal District Court for the Eastern District of Virginia in a suit to which the County of Greensville is a party will result in a school system under which the school children of the City of Emporia will receive a grossly inadequate education; and

WHEREAS under the decree aforementioned, there will be substantial overloading of certain school buildings and substan-

July 30, 1969, the City School Board adopted a plan to hold registration for the 1969-70 school year August 4-8, 1969—although the State Board had not made any ruling on the request for separate school division status (80a-81a). The registration notice invited applications from nonresidents on a tuition basis (82a).

At the July 30 meeting the city school board also instructed its acting clerk to investigate the availability of churches and vacant buildings for use should the City be unsuccessful in obtaining title to the school buildings in Emporia (81a).

On August 1, 1969, by leave of the district court (83a), the petitioners herein filed a Supplemental Complaint adding as defendants in the pending action, the City Council of Emporia and the School Board of the City of Emporia (84a-87a). The Supplemental Complaint alleged that establishment of a separately operating school system for the City of Emporia or the withholding by the City of the monies due Greensville County pursuant to the contract would "frustrate the execution of this [District] Court's order and the efforts of the County School Board of Greensville County to implement the above mentioned plan [approved by the district court on July 30, 1969] for the operation of the public school system which heretofore has served children residing in the City of Emporia," and sought to restrain the City Council and School Board from taking any acts which would interfere with execution of the outstanding district court order (86a). On August 5,

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tial underuse of other school buildings at an excessive cost to both the County and the City, the cost of school transportation will be exaggerated out of all need in that pupils will be assigned to schools on a basis other than that of proximity, the City's contribution toward education will be substantially increased without any additional benefit in education to its children, ... (71a)

the Emporia School Board made "assignments" of grades 1-7 to the Emporia Elementary School and grades 8-12 to the Emporia (Greensville County) High School, contingent upon those buildings being made available to the City School Board for the 1969-70 school year (89a).

The matter came before the district court for hearing upon petitioners' prayer for a preliminary injunction on August 8, 1969 (90a-189a). Various exhibits were introduced, including the minutes of the school board's and governing bodies' meetings, and testimony was taken.

The Division Superintendent of Schools, who would be responsible for administering a separate district unless the State Board created a new school division, testified that he had no plans to implement a separate district and had met with the city school board only once, August 5, 1969 (92a, 98a-99a). He did have statistics showing that the total student population in the combined system was, he said, approximately 63% black, while the city students were approximately 50% black and county students about 70% black (109a).

The Mayor of Emporia stated that the City Council had not discussed the establishment of a separate city school system at any of its meetings prior to July, 1969 (118a) nor had the Council or the City School Board attempted to intervene in this litigation to present their views (128a). Despite what he referred to as eight years of antagonism between Emporia and Greensville County (159a), he said the City had been satisfied with the County's school operation prior to the district court's decree (163a). The June 25 order precipitated the desire to operate a city system because of white flight which was anticipated in response to the decree (121a-122a, 167a). He said he had doubts about the willingness and ability of the County

to make the unitary system work effectively (135a) and "that in order to have a well-functioning working unitary system in the heart of southside Virginia that it will take the leadership of the city government and of the leading city members . . ." (123a). It was the City's desire, he said, to afford city students an education superior to that which they would receive in the county schools operated pursuant to the desegregation decree (124a) but he was also aware that the racial composition of the city school system would be about 50-50 (126a) and as well that the buildings which the city school board hoped to acquire from the county were the formerly white schools, still predominantly white in 1968-69 (116a).[15]

Edward Lankford, Chairman of the Emporia School Board, testified that his board met officially only to select a division superintendent with the Greensville County Board, but otherwise had "nothing to do with the county system" even while the contract was in force (140a, 145a). He said the City Board had been dissatisfied with the contract from its inception although they had not acted (147a) until the desegregation decree requiring attendance at several different schools during the twelve grades of a child's education was entered (148a). He agreed with the Mayor that successful operation of a unitary system required leadership which in his opinion the city could provide but the county could not (153a), and he said there was a "definite possibility" that city residents would be willing to pay higher taxes to support their own school system (154a).

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[15] The 1968-69 enrollment statistics can be found in the district court's opinion (298a); 98 of 2510 black students attended two white schools while again, no white students enrolled in five all-black schools. See n.8 *supra*.

Mr. Lankford was aware that creation of an independent city system would increase the percentage of black students in the remaining county system and reduce the percentage of black students to which city students would be exposed (143a). He discussed the adverse effects of separate systems:

> The Court: And it is going to have a deleterious effect on the students of Greensville County because you are going to take some of their superintendents and he will be responsible to two Boards and take buildings that they have been using, isn't that correct?
>
> The Witness: That is correct
>
> • • •
>
> The Court: As a matter of fact it is going to change the racial composition of the student population of Greensville County, which let's call it what it is, that is one of the problems in segregating schools, isn't it?
>
> The Witness: Yes, sir.
>
> • • •
>
> *By Mr. Warriner:*
>
> Q. Now, I want to know, sir, what adverse effect, what adverse effect are you talking about when you say that there would be an adverse effect on the county? A. I don't know that I could answer that. The question to which I answered that this would be an adverse effect I would like to have repeated if possible.
>
> Q. It can be repeated. The Judge asked you whether it would have an adverse effect or a detrimental effect and you agreed with him. I want to know what are the adverse effects? A. Well, as you have pointed

out if the county has a surplus of school teachers and these teachers are willing to terminate their contract to come to the city then there would be no adverse effect insofar as teachers are concerned.

If the county has a surplus of buildings and the buildings are no longer needed by the county and the city is willing to assume those buildings, that is no adverse effect.

Q. Leaving out the ifs, will the county have a surplus of teachers and will the county have a surplus of buildings? A. In my opinion, yes, sir.

Q. All right, sir.

Then you would have no adverse effect on the county? A. No, sir.

* * *

Q. I want you to, if there is anything that is unneighborly to the County of Greensville, I want you to state it. A. *The only adverse effect as asked by His Honor, the Judge, would be the racial ratio remaining in the county.* (149a, 151a-152a) (emphasis supplied)

At the conclusion of the hearing, the district judge announced that he would grant the injunction. The court noted that although a year passed between the filing of the motion for further relief and the entry of a decree, the City Council and School Board made no attempts to communicate their wishes to the County officials or to the Division Superintendent (181a-182a). Following its June 25 order, the court noted, the Mayor expressed his disapproval to the City Council and after being informed of the expected Negro enrollments at each school under the court-ordered plan, it was determined to establish an independent city system (183a). However, the court found that creation of a new entity would not only interfere with

and disrupt execution of the plan already ordered but would be unconstitutional (183a):

> Under the New Kent decision this School Board had an obligation and a duty to take steps to see to it that a unitary system was entered into. All they have done up until now, and the Court is satisfied that while their motives may be pure, and it may be that they sincerely feel they can give a better education to the children of Emporia, they also have considered the racial balance which would be roughly 50-50 which which reduce the number of white students to, under the present plan, would attend the schools as presently being operated.
>
> The Court finds that under *Brown* v. *Board of Education* 349 U.S. 294 that these defendants, all of them, have an obligation that they are going to abide by.
>
> In short, gentlemen, I might as well say what I think it is. It is a plan to thwart the integration of schools. This Court is not going to sit idly by and permit it. I am going to look at any further action very, very carefully. I don't mind telling you that I would be much more impressed with the motives of these defendants had I found out they had been attempting to meet with the School Board of Greensville County to discuss the formation of a plan for the past year. I am not impressed when it doesn't happen until they have reported to them the percentage of Negroes that will be in each school.
>
> • • •
>
> . . . The Court will be delighted to entertain motions for amendment of the plan at any time (184a-185a).

The same day the district court entered formal Findings of Fact and Conclusions of Law (190a-194a) as well as a

temporary injunction restraining "any action which would interfere in any manner whatsoever with the implementation of the Court's order heretofore entered in reference to the operation of public schools for the student population of Greensville County and the City of Emporia" (195a).

The District Court's Decision

Respondents declined to appeal from the decision granting a preliminary injunction, seeking instead to make a more extensive record (187a).

Pursuant to the injunction, schools in Emporia and Greensville County opened for 1969-70 in accordance with the district court's June 30, 1969 order. The State Board of Education at its August 19-20, 1969 meeting, tabled Emporia's request for designation as a separate school division "'. . . in light of matters pending in the federal court'" (198a). The minutes of the State Board meeting note that "[t]he Greensville County school board has passed and submitted a resolution opposing the dissolution of the present school division consisting of the county and the city. . . ." (*ibid.*).

On December 3, 1969, the Emporia School Board adopted a proposed 1970-71 budget prepared at its request by the former Superintendent of Schools of Richmond, Virginia (200a-201a). The budget is extensive and expensive, proposing numerous supplementary services (202a-223a). On December 10, 1969, the school board was informed that the City Council had accepted the budget (224a), and it proposed a desegregation plan for submission to the district court assigning grades 1-6 to the former Emporia Elementary School and grades 7-12 to the former Greensville County High School (225a). The

hearing on permanent relief was held December 18, 1969 (226a-292a).

Much of the City's evidence was repetitive of the earlier hearing. Mr. Lankford testified again that the city was dissatisfied with the contractual arrangements because it had no control over such matters as hiring, salaries or curriculum (242a). He said he had been satisfied with the education afforded city students by the county prior to the pairing order (235a) but that order required additional transportation expenditures and he feared the County School Board would be unwilling to raise the additional revenues (236a).

Emporia's Mayor also repeated his opinions that the county would not adequately support a unitary school system but the city would (289a-290a) and that without the creation of a separate system the city would lose white students to private schools during the 1970-71 school year (291a).

However, armed with the detailed budget developed and adopted *after* the district court's temporary injunction had been entered, both witnesses stressed that the city desired to operate an educational system superior to that which the county would provide. The City also presented the testimony of a Professor of Education, Dr. Neil Tracey, in support of this claim.

Dr. Tracey testified that it was his "understanding" that he was not serving the City in "any attempt to resegregate or to avoid desegregation" (269a). He compared the educational programs of Greensville County with those proposed by the Emporia School Board's 1970-71 budget without reference to the racial composition of the two systems because, he said,

> . . . my basic contention is and has been, that elimination of the effects of segregation must be an educational solution to the problem and that no particular pattern of mixing has in and of itself; has any desirable effect. . . . *The problem is to permit the Negro child to integrate into society* both in terms of general social problems and in terms of economic patterns. . . . (emphasis supplied) (270a).

Dr. Tracey preferred the Emporia budget because, he said, the county educational program did not include the kind of supplemental, supportive projects he thought were required to make integration work. He did not feel the county's school budget was high enough, for example (274a). However, he did recognize problems which might be created by separation: Emporia could draw the better county teachers off (281a); the range of exposure afforded the isolated, rural children in the county would be narrowed (284). In fact, Dr. Tracey concluded that if the county were to support what he considered an adequate educational program, he would favor continuation of the consolidated unit (285a).

In a careful opinion issued March 2, 1970 (293a-309a), the district court weighed the competing claims. The court noted that petitioners' supplemental complaint sought relief in the nature of an injunction against third parties to protect the court's decree, and that after issuance of the temporary injunction the City had answered the Supplemental Complaint (196a-197a) "denying the allegation that the plan for separation would frustrate the efforts of the Greensville County School Board to implement the plan embraced by the Court's order" (293a, 299a). Since, obviously, the City's plan to operate a separate school system for city residents would prevent execution of the plan

which had been ordered, the court pointed out that the issue before it was not solely the plaintiffs' right to relief protecting the earlier decree:

> . . . at the December 18th hearing [, i]ssues explored went beyond the question whether the city's initiation of its own system would necessarily clash with the administration of the existing pairing plan; indeed, there seems to be no real dispute that this is so. The parties went on to litigate the merits of the city's plan, developing the facts in detail with the help of an expert educator. Counsel for the city stated that "at the conclusion of the evidence today, we will ask Your Honor to approve the assignment plan for the 1970-71 school year and to dissolve the injunction now, against the city, effective at the end of this school year," Tr., Dec. 18, at 11 (298a-299a).

The district court concluded that the respondents had standing to seek amendment of the July 30 decree (299a-303a) and proceeded to the merits of the assignment plan proposed by the City.

The court described the grade assignments, noting that the City expected enrollments 10% above the number of city residents enrolled in the combined system during 1969-70 because " 'some pupils now attending other schools would return to a city-operated school system' " (206a, 297a).[16] The district judge found that the budget for the city system "clearly contemplates a superior quality educational program" requiring "higher tax payments by city residents" (297a); however, the court also remarked upon the difficulties which would arise with the establishment of two separate systems serving Greensville County and

[16] The City did not now propose to accept county students on a tuition basis without approval of the district court (225a).

Emporia: a "substantial shift in the racial balance," a city high school of less than optimum size, isolation of rural county students from exposure to urban society, disruption of teaching staff, and withdrawal of city leadership from the county's educational program.[17] The district

[17] The establishment of separate systems would plainly cause a substantial shift in the racial balance. The two schools in the city, formerly all-white schools, would have about a 50-50 racial makeup, while the formerly all-Negro schools located in the county which, under the city's plan, would constitute the county system, would overall have about three Negro students to each white. As mentioned before, the city anticipates as well that a number of students would return to city system from private schools. These may be assumed to be white, and such returnees would accentuate the shift in proportions.

• • •

The impact of separation in the county would likewise be substantial. . . . At each level the proportion of white pupils falls by about four to seven percent; at the high school level the drop is much sharper still.

• • •

In Dr. Tracey's opinion the city's projected budget, including higher salaries for teachers, a lower pupil-teacher ratio, kindergarten, ungraded primary schooling, added health services, and vocational education, will provide a substantially superior school system. He stated that the smaller city system would not allow a high school of optimum size, however. Moreover, the division of the existing system would cut off county pupils from exposure to a somewhat more urban society. In his opinion as an educator, given community support for the programs he envisioned, it would be more desirable to apply them throughout the existing system than in the city alone.

While the city has represented to the Court that in the operation of any separate school system they would not seek to hire members of the teaching staff now teaching in the county schools, the Court does find as a fact that many of the system's school teachers live within the geographical boundaries of the city of Emporia. Any separate school system would undoubtedly have some effect on the teaching staffs of the present system.

• • •

The inevitable consequence of the withdrawal of the city from the existing system would be a substantial increase in the pro-

court concluded that it should resolve the matter by approving the plan most likely to bring about the successful dismantling of the dual school system in Greensville County and Emporia:

> . . . This is not to say that the division of existing school administrative areas, while under desegregation decree, is impermissible. But this Court must withhold approval "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system," *Monroe* v. *Board of Commissioners, supra,* 391 U.S. 459, 88 S.Ct. 1705. As a court of equity charged with the duty of continuing jurisdiction to the end that there is achieved a successful dismantling of a legally imposed dual system, this Court cannot approve the proposed change. (308a).[18]

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portion of whites in the schools attended by city residents, and a concomitant decrease in the county schools. The county officials, according to testimony which they have permitted to stand unrebutted, do not embrace the court-ordered unitary plan with enthusiasm. If secession occurs now, some 1,888 Negro county residents must look to this system alone for their education, while it may be anticipated that the proportion of whites in county schools may drop off as those who can register in private academies. This Court is most concerned about the possible adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs (304a-306a, 308a).

[18] . . . Assuming arguendo, however, that the conclusions aforementioned are valid, then it would appear that the Court ought to be extremely cautious before permitting any steps to be taken which would make the successful operation of the unitary plan even more unlikely.

The Court does find as a fact that the desire of the city leaders, coupled with their obvious leadership ability, is and will be an important facet in the successful operation of *any* court-ordered plan.

• • •

While the district court discussed the possible motives of the respondents, it held that the question of motive was not controlling.[19]

If Emporia desires to operate a quality school system for city students, it may still be able to do so if it presents a plan not *having such an impact upon the rest of the area now under order*. The contractual arrangement is ended, or soon will be. Emporia may be able to arrive at a system of joint schools, within Virginia law, giving the city more control over the education its pupils receive. Perhaps, too, a separate system might be devised which does not so *prejudice the prospects for unitary schools for county as well as city residents*. This Court is not without the power to modify the outstanding decree, for good cause shown, if its prospective application seems inequitable (emphasis supplied) (306a, 309a).

[19] The motives of the city officials are, of course, mixed. . . .

* * *

Dr. Tracey testified that his studies concerning a possible separate system were conducted on the understanding that it was not the intent of the city people to "resegregate" or avoid integration. The Court finds that, in a sense, race was a factor in the city's decision to secede. . . . Mr. Lankford stated as well that city officials wanted a system which would attract residents of Emporia and "hold the people in public school education, rather than drive them into a private school * * *," Tr. Dec. 18, at 28.

* * *

This Court's conclusion is buttressed by that of the district court in Burleson v. County Board of Election Commissioners, 308 F. Supp. 352 (E.D. Ark., Jan. 22, 1970). There, a section of a school district geographically separate from the main portion of the district and populated principally by whites was enjoined from seceding while desegregation was in progress. The Court so ruled not principally because the section's withdrawal was unconstitutionally motivated, although the Court did find that the possibility of a lower Negro population in the schools was "a powerful selling point," Burleson v. County Board of Election Commissioners, supra, 308 F. Supp. 357. Rather, it held that separation was barred where the *impact on the remaining students' rights to attend fully integrated schools* would be substantial, both due to the loss of financial support and the loss of a substantial proportion of white students. *This is such a case* (emphasis supplied) (305a-309a).

The district court's order of March 2 (310a) continued in effect its injunction against interference with the prior order and denied the City's motion to modify the decree.

The Court of Appeals' Ruling

The majority opinion for the Court of Appeals, reversing the judgment of the district court (311a-319a) proceeded from different premises. In the first part of the opinion (311a-313a), the Court announces a general rule for determining whether division of a school district under court order to desegregate into two or more new entities is constitutionally permissible. The Court of Appeals refers to this Court's opinion striking down a racially gerrymandered legislative district in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) and extracts the principle that the enactment there was voided because of its discriminatory legislative purpose, which this Court inferred from the difference in racial composition between the old and the new district. This principle, says the majority, underlies school desegregation decisions voiding an all-black Arkansas school district created in 1949, *Haney* v. *County Bd. of Educ. of Sevier County*, 410 F.2d 920 (8th Cir. 1969) and prohibiting establishment of a predominantly white "splinter" school district in 1970, *Burleson* v. *County Bd. of Election Comm'rs of Jefferson County*, 308 F. Supp. 352 (E.D. Ark.), *aff'd per curiam* 432 F.2d 1356 (8th Cir. 1970).

In general, therefore, the Court holds that the permissibility of creating new districts from old ones depends upon whether the "primary purpose . . . is to retain as much of separation of the races as is possible" (313a). Where the result justifies an inference of purpose, that is the end of the matter. Where it does not, the courts are to look to other evidence in forming their judgment of the "primary purpose" for establishing new districts.

The Court of Appeals applies these principles to Emporia in the second part of its opinion. It holds (without regard to the district court's finding of a "*substantial* shift in racial balance" [emphasis supplied] [304a]) that since "the separation of the Emporia students would create a shift of the racial balance in the remaining county unit of 6 per cent" (316a), no inference of primary discriminatory purpose can be drawn.

The majority notes other evidence that the primary motive was not racial: the district court's findings that Emporia's motives were mixed (racial and non-racial), Dr. Tracey's "understanding," and Emporia's "uncontradicted" testimony (which the appellate court fails to note was rejected by the district court as unsubstantiated opinion) that the County would not raise sufficient revenues to properly operate the system.

Noting the friction between city and county caused by Virginia's "unusual" political structure, the majority holds that federal courts ought not interfere with state or local determinations of what structures may best be adopted to fund public education in the absence of "primary motive" to discriminate (318a); thus, the Court of Appeals intimates no review of the alternatives available to Emporia in deciding that creation of a separate city district is constitutional and was improperly enjoined.

Judge Winter dissented from the majority (336a-346a). His opinion views the case (and its companions) as being controlled by the principles enunciated in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968) (326a-338a) placing a "heavy burden" upon state authorities who seek to implement a desegregation plan "less effective" than another before the court. Specifically, Judge Winter found ample support in the record for characterizing the separate-district plan as less effective than the prior district

court order: the delay which would have been occasioned by the adoption of new plans in August, 1969; the substantial change of racial proportions ("the creation of a substantially whiter haven in the midst of a small and heavily black area"); and the effect on county black students of the excision from their school system of a significant part of the white population with whom they would have attended classes.

Judge Winter would find that the City had failed to meet its heavy burden to justify this less effective plan since its evidence at best showed *both* educational advantages and disadvantages flowing from the new scheme and revealed *both* racial and nonracial motives behind its adoption (341a). Judge Winter would reject the "primary motive" test and affirm because of the adverse impact occasioned by creation of new districts (346a).

Judge Sobeloff did not participate in the Emporia case because of illness, but in his dissent from a companion case, joined by Judge Winter, he rejected the "primary motive" test.

Judge Sobeloff scored the direction to district courts to weigh the motives of state officials, noting that

> resistant white enclaves will quickly learn how to structure a proper record—shrill with protestations of good intent, all consideration of racial factors muted beyond the range of the court's ears. [footnote omitted] (322a).

He suggested that these cases, like other equal protection suits in which state action has a racially discernible effect, were best considered by requiring the State to justify the racially disparate treatment as being required by a compelling state interest (322a-327a). Finally, Judge Sobeloff predicted the unworkability of the "primary motive" test:

If, as the majority directs, federal courts in this circuit are to speculate about the interplay and the relative influence of divers motives in the molding of separate school districts out of an existing district, they will be trapped in a quagmire of litigation. The doctrine formulated by the court is ill-conceived, and surely will impede and frustrate prospects for successful desegregation. Whites in counties heavily populated by blacks will be encouraged to set up, under one guise or another, independent school districts in areas that are or can be made predominantly white.

It is simply no answer to a charge of racial discrimination to say that it is designed to achieve "quality education." Where the effect of a new school district is to create a sanctuary for white students, for which no compelling and overriding justification can be offered, the courts should perform their constitutional duty and enjoin the plan, notwithstanding professed benign objectives (335a-336a).

Summary of Argument

I

The district court had before it two alternatives to desegregate a dual school system which had formerly served students of both Greensville County and the City of Emporia: one involving pairing of all the schools, and another involving separation into a county district and a city district of differing racial compositions, with the schools paired within each system. The lower court concluded the racial shift was "substantial" and that splitting the unit would have other adverse impact upon the county system, and ordered operation as a single unit. This was a proper remedial choice within the equitable discretion of the dis-

trict court which should not have been overturned by the Court of Appeals.

II

The Court of Appeals presumed that State power to create new school districts was plenary, even where there was some interference with federal court desegregation decrees, unless the "primary motivation" was the preservation of segregation. That is the wrong test; it follows neither from this Court's school desegregation rulings nor from other decisions interpreting the equal protection clause of the Fourteenth Amendment, and it is incapable of rational application in the district courts.

III

Even if the determination of motive is a proper inquiry, the Court of Appeals should have remanded the case to the district court, which had not been concerned with the issue at the trial. The Court of Appeals' own determination of the "primary motivation" behind establishment of a separate city school system cannot be supported by a full examination of the record.

ARGUMENT

I.

The District Court Properly Ignored Newly Drawn Political Boundaries in Framing a Remedial Decree to Disestablish School Segregation Which Had Been Maintained Without Regard to the Same Political Boundaries.

If this were a case involving but one school district, which operated seven schools, and the district court had rejected a student assignment plan under which the two formerly white schools would be 50% white, and the five formerly black schools would be 70% black, it would not be before this Court. *Compare Brunson* v. *Board of Trustees*, 429 F.2d 820 (4th Cir. 1970). Here two school districts are involved—the Greensville County district and the Emporia City school district (which has existed only since 1967). From 1967 until 1969 that city school district remained a part of the county system for student assignment purposes, and under the free choice plan white students throughout the county traversed Emporia's boundaries daily to attend the white schools located in the city. We submit that the district court correctly required that city and county students continue to traverse those boundary lines in order to attend classes in a fully integrated school system.[20]

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[20] It is interesting to note that Virginia historically sent black students across city or county lines in order to preserve segregation. See *Buckner* v. *County School Bd. of Greene County*, 332 F.2d 452 (4th Cir. 1964); *School Bd. of Warren County* v. *Kilby*, 259 F.2d 497 (4th Cir. 1958); *Goins* v. *County School Bd. of Grayson County*, 186 F. Supp. 753 (W.D. Va. 1960), *stay denied*, 282 F.2d 343 (4th Cir. 1960); *Crisp* v. *County School Bd. of Pulaski County*, 5 Race Rel. L. Rep. 721 (W.D. Va. 1960); *Walker* v. *County School Bd. of Floyd County*, 5 Race Rel. L. Rep. 714 (W.D. Va. 1960); *Corbin* v. *County School Bd. of Pulaski County*, 177 F.2d 924 (4th Cir. 1949).

Greensville County maintained rigid school segregation for over a decade after this Court's rulings in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), 349 U.S. 294 (1955). From 1965 until 1969 the desegregation of its schools was token, under a freedom of choice plan. After *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968) the county was ordered to develop a plan to effectively desegregate its schools, but instead it postponed the disestablishment of the dual school system for yet another year by repeatedly requesting delays and by proposing various stratagems to preserve segregation. Finally, in the summer of 1969 the district court ordered complete desegregation by pairing.

Only then, and without even so much as notice to the district court, did Emporia officials seek to separate a city school system from the rest of the county. Approximately one month before the scheduled opening of classes, the district court heard city officials who had no buildings, no specific plans for school operation, and no teachers under contract, insist that Emporia students should not attend classes pursuant to the court's order. The district court enjoined interference with the order.

Emporia renewed its efforts toward creation of a city system the next school year; the district court concluded that the attendance plan envisioned by the city would create a substantial racial disproportion between schools in the city and the county and would otherwise impede the desegregation process. The court refused to modify its earlier decree.

The district court's treatment of city and county as a combined school unit for purposes of its order was a conscientious exercise of its equitable discretion in framing a remedy for unconstitutional school segregation, of the sort this Court approved in *Swann* v. *Charlotte-Mecklen-*

burg Bd. of Educ., 402 U.S. 1 (1971). While that case had not been decided at the time, *Green* v. *County School Bd. of New Kent County, supra,* mandated federal district courts to assess proposed school desegregation plans by their efficacy, and to select that plan which offers to bring about the greatest amount of desegregation unless there were very compelling reasons for preferring another:

> Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith; and at the least it places a *heavy burden* upon the board to explain its preference for an apparently less effective method.

391 U.S. at 439 (emphasis supplied).

Here the district judge acted in accordance with the principles of *Green* by rejecting the city's scheme to place a substantially greater percentage of white students in the former white schools than in the former black schools. As this Court said, 391 U.S. at 435:

> The *pattern* of separate "white" and "Negro" schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. (emphasis supplied in part)

And *cf. Swann, supra,* 402 U.S. at 26: "[T]o assure a school authority's compliance with its constitutional duty warrants a presumption against schools *that are substantially disproportionate in their racial composition*" (emphasis supplied).[21]

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[21] The defect of the city school board's plan was not that it failed to achieve exact racial balance, *Swann, supra,* 402 U.S. at 24, but

This Court has emphasized the breadth of the remedial equitable discretion accorded district courts in school desegregation cases. *E.g., United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra. Swann* rejected a limitation of "reasonableness" placed upon lower court judges' discretion by the Fourth Circuit. Here the limit seems to turn upon the reviewing tribunal's judgment of substantiality. In both instances the appellate court improperly restricted the ability of the district courts to supervise the desegregation process, see *Raney* v. *Board of Educ. of Gould*, 391 U.S. 443, 449 (1968).

In cases involving the enforcement of constitutional rights, federal courts are not bound to follow state laws (and hence state law created boundary lines) in effectuating adequate remedies. *E.g., Haney* v. *County Bd. of Educ. of Sevier County*, 429 F.2d 364, 368 (8th Cir. 1970); *United States* v. *Duke*, 332 F.2d 759 (5th Cir. 1964); *compare Griffin* v. *County School Bd. of Prince Edward County*, 377 U.S. 218 (1964) *with Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S.E.2d 227 (1962).

The discretion of the district courts in enforcing the constitutional rights of Negro schoolchildren must extend to crossing state political boundary lines, especially where, as here, the lines are of recent origin and were readily bridged to maintain segregation. The Fifth and Eighth Circuits have sustained such power.

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that in this small system consisting of seven school buildings clustered in or near Emporia (see 132a-133a), the traditional racial identities of the schools would be maintained by the pattern of student assignment; the racial identity of no school is eliminated.

In *Lee* v. *Macon County Bd. of Educ.*, No. 30154 (5th Cir., June 29, 1971) (slip op. at pp. 11-12) (S.A. 11a-12a):[22]

> School district lines within a state are matters of political convenience. It is unnecessary to decide whether long-established and racially untainted boundaries may be disregarded in dismantling school segregation. *New* boundaries cannot be drawn where they would result in less desegregation when formerly the lack of a boundary was instrumental in promoting segregation. *Cf. Henry* v. *Clarksdale Municipal Separate School District*, 5 Cir. 1969, 409 F.2d 683, 688, n. 10.
>
> Oxford in the past sent its black students to County Training. It cannot by drawing new boundaries dissociate itself from that school or the county system. The Oxford schools, under the court-adopted plan, supported by the city, would serve an area beyond the city limit of Oxford. Thus, the schools of Oxford would continue to be an integral part of the county school system. The students and schools of Oxford, therefore, must be considered for the purpose of this case as a part of the Calhoun County School system. (emphasis in original)

Another panel of the Fifth Circuit in *Stout* v. *Jefferson County Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971) (S.A. 23a-24a), involving a brand new district, quoted this Court's decision in *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971), and held:

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[22] The decision has not yet been reported but it was reprinted as an appendix to petitioners' Supplemental Brief in Support of Petition for Writ of Certiorari, and citations in the form "S.A. ——" are to that document.

". . . [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."

Likewise, where the formulation of splinter school districts, albeit validity created under state law, have te effect of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of *Swann* v. *Charlotte-Mecklenburg, supra,* recognize their creation. [footnotes omitted]

And in *Burleson* v. *County Bd. of Election Comm'rs of Jefferson County,* 308 F. Supp. 352, 357 (E.D. Ark.), *aff'd per curiam* 432 F.2d 1356 (8th Cir. 1970), the court held:

The Area residents do not want to move out of the District; they want to move the District and its problems away from themselves. The Court does not think that they can be permitted to avoid the supposed benefits or escape the supposed burdens of the Dollarway litigation so easily, or that in the existing circumstances a majority of the residents of the Area can deprive other residents of their present right to attend fully integrated schools at Dollarway.

No resident of the Area is required to remain there. No resident of the Area is required to send his children to the District's schools. But at this time the residents of the Area as a class *cannot be permitted to use the State's laws and procedures to take the Area out of the District.* (emphasis supplied)

The unsoundness of the Fourth Circuit's approach is demonstrated by comparing this case to *Burleson, supra.* There, formation of a separate system would have increased the remaining school system's black population only 2%, 308 F. Supp. at 356, but the district court held this "will substantially increase the racial imbalance in the District's student bodies" (*ibid.*) and the Eighth Circuit affirmed "on the basis of the district court's opinion," 432 F.2d 1356. Here the district court found a 6% increase to be a "substantial shift" but the Fourth Circuit said it was of no significance.

Obviously the district courts, closest to the litigation, are in the best position to determine whether school populations are, in the context of specific school systems, substantially disproportionate, or whether the integrity of their desegregation decrees is jeopardized. The appellate courts should defer to the exercise of the district courts' discretion where the lower courts have sought to further the desegregation process.

That is the approach of the Fifth Circuit. See *Lee* v. *Macon County Bd. of Educ., supra,* slip op. at p. 11 (S.A. 11a):

> For purposes of relief, the district court treated the Calhoun County and Oxford City systems as one. We hold that the district court's approach was fully within its judicial discretion and was the proper way to handle the problem raised by Oxford's reinstitution of a separate school system.

It is the approach which should have been adopted below.

II.

The "Primary Motive" Standard Announced by the Court Below Is Ill Conceived and Ill Suited to School Desegregation Cases.

The opinion of the majority below announces a new rule for school desegregation cases, one virtually without precedent in our jurisprudence and lacking either analytical or pragmatic support. The rule adopted by the court below provides, in the context of the federal courts' responsibility for the effective enforcement of the Fourteenth Amendment, that the constitutionality of changes in school district organization and attendance patterns shall depend upon examination of the motives of those supporting the changes. If a district court concludes the primary motive was to preserve as much segregation as possible, it may enjoin formation of a new unit; if, as in this case, the lower court finds both racial and non-racial motivations, it must permit the secession in spite of any disadvantageous effects upon desegregation of the schools.

The cases cited by the majority of the Court of Appeals fail to support its thesis that the existence of racial discrimination is to be determined by inquiring into the desires and purposes of those whose acts disadvantage racial minorities.

Gomillion v. *Lightfoot*, 364 U.S. 339 (1960), principally cited by the majority below, came before this Court after a dismissal on the papers in the district court. There were no allegations by the plaintiffs of purposefulness;[23] hence,

[23] The allegations of the Complaint were:

> Prior to Act 140 the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure as indicated in the diagram appended to this opinion. The essential inevitable effect of this redefinition of

in ruling that dismissal was improper and that the allegations were sufficient to state a justiciable cause of action, this Court had no occasion even to consider the relevance of legislative intent. Certainly Mr. Justice Frankfurter's language does not intimate what the majority below elicits from *Gomillion*:

> It is difficult to appreciate what stands in the way of adjudging a statute *having this inevitable effect* invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens. 364 U.S. at 342. (emphasis supplied)

Haney v. *County Board of Educ. of Sevier County*, 410 F.2d 920, 924 (8th Cir. 1969), also cited by the majority below, specifically eschewed inquiry into the intent or motive of the legislators:

> "Simply to say there was no intentional gerrymandering of district lines for racial reasons is not enough. As Mr. Justice Harlan once observed, "[T]he object or purpose [24] of legislation is to be determined by its natural and reasonable effect, whatever may have been

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Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, inter alia, the right to vote in municipal elections. 364 U.S. at 341.

[24] Even if the Fourth Circuit meant to resurrect the old and confusing notion of a distinction between legislative "motive" or "intent" and "purpose," viewing *Haney* as resting upon a finding of legislative "purpose," that hardly serves to sustain the exploration of personal motivations undertaken by the Court of Appeals. See J. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970).

the motives upon which legislators acted." *New York* v. *Roberts*, 171 U.S. 658, 681 (1898) (dissenting opinion).

Finally, the Court below also cited *Burleson* v. *County Board of Election Comm'rs of Jefferson County, supra.* A careful reading of that opinion reveals that although "[m]uch of the evidence at the trial was directed at the motive of the proponents of secession," 368 F. Supp. at 357, the court did not base its ruling upon that consideration. (In fact, just as did the district court here, it found motives were mixed. *Ibid.*).

The "primary purpose" rule constructed by the Fourth Circuit does not follow, then, from any established legal principles. At best, it represents the majority's attempt to balance the rights of black students to attend "only unitary schools," *Alexander* v. *Holmes County Board of Educ.*, 396 U.S. 19 (1969), against "the legitimate state interest of providing quality education for the state's children" (313a). That conception of a balancing process misconceives the issue, for the vindication of constitutional rights may not be sacrificed in the name of "quality education" or any other educational doctrine:[25]

> [T]he obligation of a school district to disestablish a system of imposed segregation, as the correcting of a constitutional violation, cannot be said to have been met by a process of applying placement standards, educational theories, or other criteria, which produce the result of leaving the previous racial situation existing, just as before . . . .

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[25] Nothing in the Court of Appeals' opinion prevents whiter areas from separating from desegregating majority-black systems in order to provide "quality education" defined by some fanciful but impressive projection of expenditures prepared for the purpose. See text at p. 50 *infra*.

> Whatever may be the right of these things to dominate student location in a school system where the general status of constitutional violation does not exist, they do not have a supremacy to leave standing a situation of such violation, no matter what educational justification they may provide, or with what subjective good faith they may have been employed. As suggested above, in the *remedying of the constitutional wrong, all this has a right to serve only in subordinancy or adjunctiveness to the task of getting rid of the imposed segregation situation.* (emphasis supplied)

Dove v. *Parham,* 282 F.2d 256, 258-59 (8th Cir. 1960).

Furthermore, the Fourth Circuit weights the balance not in favor of desegregation, but in the other direction. The Court of Appeals' test places the burden upon the petitioners—not the state officials, as in *Green*—to demonstrate that the primary motivation of those who seek to operate a separate system is to maintain segregation.

Because of the inherent difficulty of determining subjective mental states, inquiries into intent have generally been limited to those necessitated by statute. See *Palmer* v. *Thompson,* 403 U.S. 217, 224-25, 241-43 (1971).

In all of the cases which have dealt with the creation of new school districts amidst the process of eliminating the vestiges of segregation, except those in the Fourth Circuit, decision has turned on the *effects* of organizing new units, and not the motivations therefor. In *Lee* v. *Macon County Bd. of Educ., supra,* slip op. at p. 11 (S.A. 11a), the Court wrote:

> The City's action removing its schools from the county system took place while the city schools, through the county board, were under court order to establish a

> unitary school system. The City cannot secede from the county where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on desegregation of the county school district.

Similarly, in *Stout* v. *Jefferson County Bd. of Educ., supra,* 448 F.2d at 404 (S.A. 24a), the Fifth Circuit held that

> . . . where the formulation of splinter school districts, albeit validly created under state law, have the effect[2] of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of Swann v. Charlotte-Mecklenburg, *supra,* recognize their creation.

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[2] The process of desegregation shall not be swayed by innocent action which results in prolonging an unconstitutional dual school system. The existence of unconstitutional discrimination is not to be determined solely by intent. Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); Bush v. Orleans Parish School Board, 190 F.Supp. 861 (E.D. La., 1960); aff'd sub nom. City of New Orleans v. Bush, 366 U.S. 212, 81 S.Ct. 1091, 6 L.Ed.2d 239 (1961); United States v. Texas, 330 F.Supp. 235, Part II (E.D. Tex. 1971); aff'd as modified, United States v. Texas, 447 F.2d 441 (5th Cir., 1971).

As we have discussed above, the *Burleson* case involved no determination that illegal motives predominated; rather, the district court granted relief because of the unfavorable effects creation of a new district would have upon the rest of the area under decree. In *Aytch* v. *Mitchell,* 320 F. Supp. 1372 (E.D. Ark. 1971), the court found the movement for a separate district was racially motivated but rested his ruling on the impact which would be produced. And finally, in an analogous situation, the New Jersey Supreme Court, construing the federal and state policies in favor of equal educational opportunity, held that the Commissioner of

Education in that state could validly prevent the termination of a contract between school districts and the operation of separate systems where separation would result in an imbalance between the new entities and would have other deleterious effects upon the educational program. *Jenkins* v. *Township of Morris School Dist.*, —— N.J. ——, —— A.2d —— (1971) (S.A. 25a-53a). Interestingly, in discussing a nonbinding referendum against consolidation which had been conducted in the district which wished to terminate the contract, the court emphazised that intent was not the standard upon which judgment rested:

> It has been suggested that it was motivated by conconstitutionally impermissible racial opposition to merger (*cf. Lee* v. *Nyquist, supra,* 318 F. Supp. 710; *West Morris Regional Board of Education* v. *Sills,* —— N.J. —— (1971)), but we pass that by since the commissioner made no finding to that effect and *his powers were, of course, in no wise dependent on any such finding.* (—— N.J. at ——, —— A.2d at ——) (S.A. 53a) (emphasis supplied)

A test of motivation is nothing less than regression to the time when "good faith," rather than results, was considered sufficient compliance with the State's obligation to desegregate. But "[t]he good faith of a school board in acting to desegregate its schools is a necessary concomitant to the achievement of a unitary school system, but it is not itself the yardstick of effectiveness." *Hall* v. *St. Helena Parish School Board,* 417 F.2d 801, 807 (5th Cir.), *cert. denied,* 396 U.S. 904 (1969). This Court and the lower federal courts have for years measured the adequacy of desegregation efforts by their results, and not the intentions of those charged with the obligation to eradicate the dual system. There was, for example, no finding in *Green* that the New Kent County School Board

adopted a freedom-of-choice plan because they did not think it would work to desegregate the public schools of the county. It was sufficient that the plan did *not* work. Other decisions employed the same rationale. *E.g., Goss* v. *Board of Educ. of Knoxville,* 373 U.S. 683 (1963) (minority-to-majority transfer plan); *Ross* v. *Dyer,* 312 F.2d 191, 196 (5th Cir. 1963) (brother-sister rule); *Clark* v. *Board of Educ. of Little Rock,* 426 F.2d 1935 (8th Cir. 1970) (geographic zoning).

In short, the majority's "primary purpose" test is at war with the standards traditionally applied in school desegregation cases. This is made less apparent because the majority opinion does not really treat the matter as a school desegregation case. But, if different standards are to apply to this situation, then we submit that those suggested by Judge Sobeloff are the proper ones.

There can be no question whatever that the establishment of an operative separate Emporia school system, whose student assignments are segregated from Greensville County's, is state action with a racially differential impact. Where there had formerly been one school unit which all city and county students attended, there would be created a city district, 50% white and a county district, 70% black, ringing the city. The fact that blacks and whites had not previously attended school together, except in token numbers would serve only to heighten the awareness of disproportion.

It would be entirely appropriate to view this action, therefore, as creating a racial classification, and to require a showing of a compelling state interest to justify the racially differential result. *E.g., Kennedy Park Homes Assn., Inc.* v. *City of Lackwanna,* 436 F.2. 108(2d Cir. 1970) (per Mr. Justice Clark), *cert. denied,* 401 U.S. 1010

(1971); *Hawkins* v. *Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *pending on rehearing en banc; Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1969).[26]

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[26] The concerns which Emporia said prompted its decision to operate its own school system hardly amount to a compelling state interest which cannot be satisfied by other means which do not have racially discriminatory effects. For example, City witnesses said they doubted that the County would meet the increased expenditure needs associated with the operation of a unitary school system and also maintain the level of the educational program offered (236a, 289a-290a). The district court is not without the power, in the exercise of its equitable jurisdiction, to deal with such matters. In *Bradley* v. *School Bd. of Richmond*, 325 F. Supp. 828, 847 (E.D. Va. 1971), the same district judge directed that when a desegregation plan was effectuated, "the operation of city schools free from racial bars may not be cause for a reduction in educational quality or the discontinuance of courses, services, programs, or extracurricular activities traditionally offered." The court's order issued the same day enjoined the defendants to

> (b) operate the public schools of the City of Richmond pursuant to the aforementioned desegregation plan 3 during the 1971-72 school year and thereafter, unless and until this order be vacated or modified, such operation not to be cause for any reduction in educational effort or the discontinuance or reduction of courses, services, programs, or extra-curricular activities which traditionally are offered.

The City Council of Richmond, which had been joined as a party upon motion of the plaintiffs, was directed to

> raise or appropriate and authorize the expenditure of funds sufficient to operate the public schools in the City of Richmond in conformity with this decree and in particular shall raise or appropriate and authorize the expenditure of funds by the School Board for the acquisition of transportation facilities necessary for the implementation of plan 3 if so requested by the School Board and informed that, in the opinion of the School Board, the Board does not have sufficient funds at its disposal to acquire such facilities and also operate the public schools of the City of Richmond in conformity with other portions of this decree; . . . . (*Bradley* v. *School Bd. of Richmond*, Civ. No. 3353 (E.D. Va., April 5, 1971).

In *United States* v. *Georgia*, Civ. No. 12972 (N.D. Ga., Jan. 13, 1971), three federal district judges ruled that a county could not,

Not only is the "primary motive" test out of harmony with the decisions of this Court in the area of school desegregation, but it is imprudent to require federal courts carrying out their important functions in the desegregation process—who are confronted with attempts to establish new districts—to investigate the nebulous mental state of school officials. Judge Sobeloff's warning that "resistant white enclaves will quickly learn how to structure a proper record—shrill with protestations of good intent, all consideration of racial factors muted beyond the range of the court's ears" (322a) is the more significant when one considers that respondents developed an elaborate budget which — if actually implemented — would have resulted in a "superior" educational program, after deciding that they would like to make a more extensive record (187a).

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when ordered to desegregate, suddenly terminate extra-curricular programs it had previously offered unless operation of the programs

> is financially impossible [which shall be defined to mean that] the anticipated deficit for any activity is substantially greater than the deficit incurred in the operation of a similar activity at the Randolph County High School in previous school years, and there are no funds available from any source with which to offset such deficit (Order at pp. 4-5).

And see *Plaquemines Parish School Bd.* v. *United States,* 415 F.2d 817 (5th Cir. 1969).

The City witnesses also complained that they had no voice on the county school board. But Virginia law provided for representation of the city's interests where there was a contract with the county. See Va. Code Ann. §22-99 (Repl. 1969). At the time of the hearing on preliminary injunction, in fact, two of four Greensville County School Board members were city residents (168a). But even assuming the validity of the city's complaint, it could have been dealt with in a way which did not involve reducing the effectiveness of the desegregation plan. Again, the district court was not without power to modify the requirements of state law concerning representation, as a part of its equitable remedy to disestablish the dual system. See *Haney* v. *County Bd. of Educ. of Sevier County,* 429 F.2d 364, 368-69, 372 (8th Cir. 1970).

Nothing better marks the inadequacy of so subjective a standard as *intent* to protect the desegregation decrees of federal courts from "yet another method to obstruct the transition from racially separated school systems to school systems in which no child is denied the right to attend a school on the basis of race" (313a) than the superficial manner in which the standard was applied to this case (see III *infra*). Affirmance of the ruling below can be expected to loose a plethora of attempts to "incorporat[e] towns for every white neighborhood in every city," *Lee* v. *Macon Bd. of Educ., supra,* slip op. at p. 11 (S.A. 11a), just as occurred in Jefferson County Alabama after the district court's approval of the first secession (see S.A. 54a-55a). And if the local district courts are to be required to make determinations of motive, there will inevitably be interminable testimony by numerous officials and truly "a quagmire of litigation" (334a). The "rule" adopted below may well turn out to be ineffective to reach even the most outrageous violations, let alone to properly carry forward the constitutional requirements with maximum accommodation of other interests.

III.

Even Were the Court of Appeals' Standard Acceptable, It Was Misapplied in This Case.

The Court of Appeals announced a new constitutional rule in this case and proceeded to make its own judgments, based on the record, and applying the new standard. We have argued above that the district court's order was well within its discretion in fashioning a remedy—and on that account alone ought not to have been disturbed. We have also argued that the Court of Appeals' new rule is unworkable and constitutionally wrong. But even if the Court of Appeals was correct about the standard to

be applied, it should have left the application of that standard in the first instance to the district court. Instead, it superficially skimmed the evidence and reached a result which is clearly unsupportable on the record.

It is perfectly apparent that the district judge never had an opportunity to apply a "primary motive" test. The comments of the court and of the attorneys during the two hearings establish that none of the parties conceived of any such issue. At the end of a colloquy during the December, 1969 hearing, for example, the district court said:

> I think the people have legal rights of motivation but it may not be a factor the—it may not be a factor for the Court to even consider (252a).

The district court explicitly made no judgment about predominant motivation:

> . . . the Court is satisfied that while their motives *may be* pure, and it *may be* that they sincerely feel they can give a better education to the children of Emporia, they also have considered the racial balance . . . (emphasis supplied) (184a).
>
> The motives of the city officials are, of course, mixed. . . . (305a)
>
> This Court's conclusion is buttressed by that of the district court in Burleson . . . [where the court] ruled not principally because the section's withdrawal was unconstitutionally motivated . . . [but because of] the impact on the remaining students' right to attend fully integrated schools . . . (308a-309a).

Even the attorney for respondents did not conceive motive to be the issue:

[Recross Examination of George F. Lee by Mr. Warriner:]

Q. Has it been the intent, the purpose—well, I suppose intent and purpose are not proper for inquiry . . . (131a).

Instead of remanding to allow the district court, which was more familiar with the facts and circumstances and could weigh the demeanor and credibility of witnesses, to apply the newly defined standard, however, the Court of Appeals simply canvassed the record for itself and, without questioning any of the district court's findings, reversed its judgment. *Cf. Keyes* v. *School Dist. No. 1, Denver,* 396 U.S. 1215 (1969) (Mr. Justice Brennan, Acting Circuit Justice); *Northcross* v. *Board of Educ. of Memphis,* 397 U.S. 232 (1970). While we seriously question whether the Court of Appeals' action was correct, this Court has the same record before it and ought to make its own independent review of the facts in considering the Fourth Circuit's ruling.

Were this Court sitting to review factual findings of the Court of Appeals, we believe they would meet the "clearly erroneous" standard. When all of the evidence is considered, it overwhelmingly establishes that a separate city school system was conceived in response to, and represents a determined effort to evade, the desegregation decree of the district court.

The majority opinion below begins its analysis, after summarizing some of the facts, by looking to the racial change wrought by the establishment of separate districts (315a-316a). Because the county system's black population rises only six per cent, the Fourth Circuit concludes that "the effect of the separation [does] not demonstrate that

the primary purpose of the separation was to perpetuate segregation . . . ." (316a). No comparison of the rise in white student percentage in the present county district and the new city district, or between the racial composition of the two new systems, is made. So far as the disproportion between city and county schools, the majority below intimates that since both systems will be majority black (albeit one 52% and the other 72%) that is the end of the matter because, in the Court's view, "[t]he Emporia city unit would not be a white island in an otherwise heavily black county". (315a).

The majority below conveniently ignores the district court's finding that the new district would create a "substantial shift in the racial balance" (304a).

Continuing, the Court of Appeals says that there is "strong" evidence that the city's motives were not racial (316a); the Court mentions but four points. First, the Court refers to Dr. Tracey's "understanding" that it was not the intent of the city to resegregate (316a). Of course, Dr. Tracey was an educational expert and not a psychologist, and the district court was not bound to accept his opinion about what the majority below perceives to be the ultimate issue in this case. In the district court's opinion, the following juxtaposition of sentences suggests that the lower court chose not to assign Dr. Tracey's "understanding" much weight:

> Dr. Tracey testified that his studies concerning a possible separate system were conducted on the understanding that it was not the intent of the city people to "resegregate" or avoid integration. The Court finds that, in a sense, race was a factor in the city's decision to secede (307a).

The majority below also notes that Emporia proposed what Dr. Tracey considered a superior educational program. Indeed, it is not disputed that the program outlined in Dr. Willett's budget is a good one; the district court noted that "[t]he city clearly contemplates a superior quality education program" (297a). That is the beginning of the inquiry into motive, however, not its end. Uncontrovertibly this budget was prepared only after the temporary injunction was issued and the City had gained a better idea what evidence might best serve its cause (187a). The proposed budget may be some evidence of the city's motive in seeking to form its own school system, but in light of the significant amount of evidence more contemporaneous to the inception of the idea (which the Court of Appeals does not discuss, see below), it is hardly "strong" evidence.

Next, the Court of Appeals says:

> In sum, Emporia's position, referred to by the district court as *"uncontradicted,"* was that effective integration of the schools in the whole county would require increased expenditures in order to preserve education quality, *that the county officials were unwilling to provide the necessary funds,* and that therefore the city would accept the burden of educating the city children. (emphasis supplied) (317a)

This is the linchpin of the entire Court of Appeals' holding, for as we read the opinion, this is what establishes to the satisfaction of the Court that Emporia's interest was in preserving "quality education," not in avoiding integration ratios it considered unfavorable. How "strong" is the evidence, then, if far from finding uncontradicted evidence of the county's unwillingness to adequately support a school

program, the district court actually rejected it! What the district court said was:

> . . . The city's evidence, uncontradicted, was to the effect that the board of supervisors, *in their opinion, would not be willing to provide the necessary funds.* (emphasis supplied) (306a).

This was evidence from city officials, who had also spoken of eight years of antagonism between the city and the county (159a). The district court continued:

> While it is unfortunate that the County chose to take no position on the instant issue, the Court recognizes the City's evidence in this regard to be conclusions; and without in any way impugning the sincerity of the respective witnesses' conclusions, this Court is not willing to accept these conclusions as factual simply because they stand uncontradicted. .... ..(306a)

Finally, the Court of Appeals refers to difficulties and awkwardness arising from Virginia's political structure, noting that as a separate city Emporia could not obtain an increase in school expenditures to benefit city children under the contract arrangement except with approval of the County Board of Supervisors, on which the city was not represented and for whose members city residents did not vote (317a-318a). We agree that Virginia's "unusual" political structure furnishes a *possible* motive for Emporia's actions, but we think that examination of the rest of the record—none of which was mentioned or explained by the majority opinion—negates the conclusion that that was the city's *actual* motive.

The city did not establish that it had ever attempted to increase school expenditures. While it was purportedly worried about the county's willlngness to undertake addi-

tional expenditures it felt would be necessary to operate a unitary system, the city school board never had any discussions with the county board about the kind of desegregation plan which should be proposed (140a, 145a, 148a).

Without repeating the matters summarized in the Statement, above, we would direct the Court's attention to a few important subjects upon which evidence was introduced which are relevant to the question of the city's motive.

The timing of the city's move to operate a separate system strongly suggests racial motivation. The minutes of school board and city council meetings and the documentary evidence described in the Statement, all of which represent contemporaneous recordings of the events before litigation over this matter began, suggest very strongly that the idea of leaving the county system did not occur to city residents until substantial integration became likely. Indeed, city officials went so far as to testify that the court's decree was the "precipitating factor" because they were dissatisfied with the pairing plan.

The city attempted to establish that there had been long-standing dissatisfaction with the arrangement under which the county operated public schools for city children, and that it was merely coincidental that the interest in separation matured at the time the desegregation decree was entered. The city witnesses pointed to the "ultimatum" from Greensville County in 1968 which they claim forced them to accept the contract arrangement instead of being able at that time to establish the separate school system they desired to operate (233a).

The city's claim simply cannot be squared with the facts. Despite alleged serious difficulties between the town or city of Emporia and Greensville County which had continued for a considerable period of time, there had been no

prior attempt to establish a separate system—although under Virginia law, even while Emporia was a town, it could have petitioned the State Board of Education to operate as a school district separate from Greensville County. Va. Code Ann. §22-43 (Repl. 1969). Furthermore, it was open to Emporia immediately at the time of its transition from a town to a city, to bring the kind of lawsuit it brought in 1969 to establish equities in school buildings between the city and the county. Va. Code Ann. §15.1-1004 (Repl. 1964). Since this course of action was open to the city, it was not, as the Mayor charged, the inability to agree upon a price for the school buildings located in the city (119a) which necessitated the execution of the contract with Greensville County in 1968. While the County Board of Supervisors did eliminate the possibility of joint school operation (30a), the city was satisfied with the contract arrangement while the schools were segregated (163a, 235a), and the delay in executing the agreement was occasioned by negotiations about the terms of the contract; six different proposals were made by the city to the county (230a). Both the Mayor and the chairman of the city school board testified that they were satisfied with having the county educate city children up until the time the desegregation order was entered (163a, 235a).

On the other hand, city officials testified that they were aware that establishing a separate district would result in two systems of significantly different racial composition (the chairman of the city school board termed the increased black percentage in the county district an "adverse effect" of the secession (152a)), and they also stated their concern with avoiding withdrawal of students to private schools (see 290a-291a). Furthermore, the city's rush after June 25, 1969 to set up a new district by September, 1969 even if it required operating in churches and vacant buildings,

contrasts sharply with the budget it came up with in December, 1969, and casts doubts upon the city's claim to be interested in the best education of its children.

In sum, the claims of the city to a continuing and long-standing desire to free itself from county domination which prevented attainment of educational quality, are far outweighed by its unexplained failure to take any action until integration was to occur, its awareness that a separate system would contain a more palatable racial mix which might prevent white flight, and the very frankly expressed dissatisfaction on the part of the city residents and officials with the court's desegregation decree.

No less than total segregation, the attempt to preserve a racial mixture in the schools more to the liking of the dominant white population is "a living insult to the black children and immeasurably taints the education they receive." *Brunson* v. *Board of Trustees,* 429 F.2d 820, 826 (4th Cir. 1970). That is exactly what respondents' scheme would do if it were implemented. See the comments of Judge Winter, dissenting below (340a-341a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the case remanded with instructions to affirm the judgment of the district court.

Respectfully submitted,

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